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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 184

A. N. CONE,

Petitioner,

vs.

WEST VIRGINIA PULP & PAPER COMPANY.

PETITIONER'S BRIEF ON CERTIORARI

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

JEFFERIES, MCLEOD & UNGER,
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Walterboro, South Carolina;
W. J. MCLEOD, JR.,
Walterboro, South Carolina;
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To the Honorable Supreme Court of the United States:

This Honorable Court having granted certiorari in the above entitled case, limited to the questions of the Rules of Federal Procedure, as set forth in Petition for Writ of Certiorari, your Petitioner respectfully asks this Honorable Court to reverse the decision of the Circuit Court of Appeals, Fourth Circuit, and to enter judgment and verdict for the Plaintiff as entered by jury and court, United States District Court for the Eastern District of South Carolina, Charleston Division, dated May 22, 1945, or to reverse the judgment of the Circuit Court of Appeals and remand to the District Court, Charleston Division, for a new trial or for such other or further relief as this Honorable Court shall deem equitable, just and proper.

The plaintiff would respectfully show this Honorable Court as follows:

Official Report

The decision of the Circuit Court of Appeals, Fourth Circuit, is shown in the record at page R. 139, and is reported 153 F. (2d) page 576.

Statement of Grounds of Jurisdiction

The judgment herein reviewed was filed by the District Court of the United States for the Eastern District of South Carolina, Charleston Division, on April 1, 1946, pursuant to mandate of the United States Circuit Court of Appeals, Fourth Circuit, February 7, 1946, in which case Petition of the plaintiff, A. N. Cone, for rehearing was denied by the United States Circuit Court of Appeals, Fourth Circuit, by Order filed March 15, 1946, the said Petition for rehearing having been timely filed.

Jurisdiction of this Court is invoked under Section 347, U. S. C. A., Title 28, Chapter 9, and the revised Rules of the Supreme Court of the United States, Rule 38, as set forth in U. S. C. A. 28, and cases therein cited, it being the position of the plaintiff that the said decision of the Court of Appeals was rendered contrary to the Federal Rules of Civil Procedure promulgated by this Court, and the Seventh Amendment to the Constitution of the United States.

Statement of Case

This was an action of trespass *quare clausum fregit* commenced by A. N. Cone in the Court of Common Pleas for Colleton County, in October, 1944, and removed by the defendant, West Virginia Pulp and Paper Company to the United States District Court for the Eastern District of South Carolina, Charleston Division. The plaintiff al-

legal he was owner of and had been in quiet and peaceable possession of a tract of land One Hundred Six (106) acres located in Dorchester County, South Carolina, having claimed the property under deed and plat from his mother in 1920, which plat clearly defined the close; that he had paid taxes under said deed for more than twenty years and had enjoyed the peaceable possession thereof; that the boundary lines of the said tract were well defined and marked, having been laid out by the plaintiff and by former owners more than twenty years and acted upon and acquiesed in by them and all subsequent owners; that during the month of September, 1941, the defendant, West Virginia Pulp and Paper Company, without plaintiff's knowledge or consent cut, destroyed and carried off a large quantity of timber, damaging the plaintiff in the amount of Twenty-Five Thousand ($25,000.00) Dollars. (See amended Complaint R. 1.)

The defendant entered a general denial raising the issues of fact of title and of possession to be tried by jury after due demand. Trial by jury was held before the Honorable J. Waties Waring, District Judge, and a jury at Charleston, South Carolina, at the May Term, 1945.

At the trial, the plaintiff introduced a deed from his mother dated 16 August 1920, recorded same day (R. 51), and plat describing the land by James A. Postell, Surveyor, dated August 16, 1920 (R. 54), and certificate of payment of taxes on the said described land from 1921 to 1944 (R. 55). Plaintiff also claimed this certificate showed that his father paid taxes on Three Hundred Eighty-Five (385) acres of land up to 1916, and that in 1917, the father returned only Three Hundred Twenty (320) acres of land and that his mother, Mrs. C. F. Cone, began in 1917 to return a tract of land in this School District up until 1921, when she conveyed it to the plaintiff. It was the plaintiff's testimony that this was some evidence of a transfer of the disputed land from

his father to his mother in 1917, although he knew nothing of a deed from the father to the mother.

Plaintiff further introduced deed from his grandfather, Adam Miles Cone, to his father, Miles Cone, dated September 19, 1888 (R. 68) and identified the property in dispute as a part of the said conveyance, and also introduced plat of his grandfather, Adam Miles Cone, dated January 15, 1847, and identified the disputed land as being a part of the 1847 plat (R. 71). The plaintiff further testified that his mother, father and his grandfather had successively laid claim to and had been in possession of the land since prior to the War Between the States, at which time the land records were destroyed (R. 11). The plaintiff's brother, Owen Cone, substantiated plaintiff's testimony that the mother, father and grandfather were in possession of the land and that it was a part of their holdings since he now owns the balance of the estate (R. 27-8).

Plaintiff further introduced oral testimony of old residents of the neighborhood that the land had always been known as Cone land and had never been a part of lands purchased by the defendant (John D. Harrison, R. 105; Robert Williams, R. 108; Frank Green, R. 109; Julia Anne Driggers, R. 110). This was admitted on cross-examination of the defendant's witness (Wesley N. Cone, R. 112; John Harvey Cone, R. 113).

The plaintiff's claim of title and possession in himself and his ancestors was further shown by admission of the defendant, by its attempt to purchase his claim at a tax sale by the sheriff of Dorchester County, after the trespass complained of, at which sale the defendant bid in the land sold in the name of the plaintiff. (Testimony of H. H. Jessen, Sheriff of Dorchester County, R. 111-112).

The plaintiff testified he hunted on the property all of his life, sometimes as long as a week, and got clapboards and

wood, covering for barns and houses, two and three foot boards (R. 13, 16). He further testified his father before him hunted the property and got out plyboards (R. 8). He denied that there was a fire line cut on the property, or that the defendant had posted the property for no trespassing (R. 13). The plaintiff's brother, Owen Cone, testified that he owned the remainder of the plaintiff's father's estate, composed of Three Hundred Twenty (320) acres adjoining the disputed property on the west (R. 28); that he was familiar with the disputed property which had been formerly a part of the plaintiff's father's holdings, and that he had never seen a fire line on the property (R. 30).

The disputed property was bounded on the north by an ancient canal and on the east and west by ancient canal banks, which had been in existence since before the War Between the States. The crux of the dispute over the property revolved around the defendant's attempt to extend the Waring Plantation south of the ancient canal in order to take in the disputed property (see defendant's exhibit No. D. 1, composite plat R. 56A). The plaintiff's oral testimony from older men who had lived on the defendant's Waring Plantation all of their life, one of whom had even rented it for years, denied that the Waring Plantation ever went south of the canal; and stated that Cone land lay south of that ancient canal (John D. Harrison, R. 105; Robert Williams, R. 108; Frank Green, R. 109-10), was uncontradicted.

The plaintiff further introduced testimony to show that the defendant did not lay claim to the land in dispute by introducing tax records (R. 129-31) showing that the defendant did not return any land for taxes in the School District in which the disputed land lies from 1925 to 1935 (the defendant claiming under deed from one J. Lamb

Perry in 1924), and that the defendant probably paid no taxes on the land in dispute from 1936 to 1944, the date of trial, since they returned the property under which they claimed title, as Five Hundred Eight (508) acres known as the Waring tract.

> *"The payment of taxes is not evidence of title, as is supposed in popular myth, but failure to pay is evidence that no claim was made."* Gadsden *v.* Westshore Investment Company, 99 S. C. 172, 82 S. E. 1052-1053.

The deed to the defendant from J. Lamb Perry, dated April 5, 1924 (four years later than the plaintiff's deed), increased the acreage of the Waring Plantation (by defendant's survey), from Five Hundred Sixty-Three (563) acres to Eight Hundred Sixty-Eight (868) acres, as conveyed to the defendant's grantor (R. 59) in order to include the disputed land. The said deed to the defendant's grantor dated 1899, states that the said Waring Plantation had been composed of Five Hundred Sixty-Three (563) acres for more than forty years prior to 1899. The Five Hundred Sixty-Three (563) acres it is admitted was composed of two tracts of Five Hundred (500) acres and Sixty-Three (63) acres which were not contiguous and only the Five Hundred (500) acre tract joined the disputed property.

The defendant, West Virginia Pulp and Paper Company, introduced a deed dated April 5, 1924 (R. 57) and composite plat of some ten thousand acres (R. 56A) of adjoining lands, which plat the defendant claimed included the disputed property. The defendant further introduced a chain of title to the adjoining lands (known as the Waring Plantation), concerning which chain of title the plaintiff laid no dispute other than to deny identification of the disputed property as a part thereof. The defendant introduced oral testimony that a fire line had been cut on the disputed property by the CCC Boys (probably in 1935, the

active year of the CCC), and that the defendant's woods riders had travelled over the disputed property posting trespass notices and warding off trespassers (Hill Beach, R. 31; Howell Bivens, R. 35; Tom Peeples, R. 39).

On cross-examination, the defendant's caretaker, Mr. Howell Bivens, admitted that although he had been in charge of the defendant's properties for eighteen years, from 1925, he had been on the disputed property only three times (R. 115-16). The defendant's witness, Russell E. Haynes, testified on direct examination that the defendant had paid taxes on the disputed land from 1925 to 1940 (R. 123), and on cross-examination, when he was forced to exhibit the tax receipts to the jury, it was admitted that the taxes were not paid by the defendant but the bundle of exhibits were, in reality, tax receipts of a different corporation for huge, unidentified acreages of land (R. 126-8).

It was admitted that the lands were wild, uncultivated, unfenced and uninhabited swamp lands, fit only for the growing of timber.

The jury returned a verdict for the plaintiff in the amount of Fifteen Thousand ($15,000.00) Dollars, and judgment was entered by the District Court, June 5, 1945. The defendant appealed and United States Circuit Court of Appeals, Fourth Circuit, in its opinion dated February 7, 1946, reversed the verdict of the lower Court and issued a mandate entering judgment for the defendant (R. 139-149, 150).

The plaintiff, A. N. Cone, petitioned for a rehearing and an Order denying rehearing was entered on March 15, 1946 (R. 149). The plaintiff petitioned for a Writ of Certiorari dated May 27, 1946, being duly filed, and Writ of Certiorari was issued by this Honorable Court dated the 14th day of October, 1946.

ARGUMENT

I

The action of the Circuit Court of Appeals in Reversing the verdict and judgment of the Circuit Court and in gratuitously entering judgment for the defendant is directly in conflict with Rule 38 of the Rules of Civil Procedure and beyond the authority of Rule 50-B of the Rules of Civil Procedure.

Rule 38 of the Rules of Civil Procedure provides: "(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

Under all the evidence in the case, the issues of fact presented to the jury for their determination and passed upon by them were in the main composed of two propositions. As clearly stated by His Honor, J. Waties Waring, in his charge to the jury, "Your consideration of the case is whose property was it, whose timber was it,—If you find the lands were Mr. Cone's you must find the damage to his and assess that in money. It is a pure and simple business matter. There is not sentimental matter in this case, it is a simple business matter, who owned the land, who owned the trees on the land" (R. 45).

This able jurist, in his charge to the jury, went to great lengths to make clear these issues of fact and later (R. 47) charged them: "Now, gentlemen, each side claims to have been in possession; each side claims to have been in lawful possession, and I think that is the most important thing you have to decide because *each side claims it had legal title and possession was based upon legal title* and if you should

find one side was in possession and the other side was not in possession that would be your verdict in this case."

The court in its charge further pointed out that on these issues of fact there was conflicting testimony. The court stated: "Now, gentlemen, in this case each side has claimed title and each side has put in deeds of title, deeds, written papers by which each attempts to trace his or its title down to the present date" (R. 46).

"Now, then, for the plaintiff, Cone, there was testimony of certain witnesses that the lines were there, the canal was spoken of as the line separating it from the Waring or Perry tract of land. There was testimony the former owner, Mr. Lamb Perry, said that canal was the line, 'you mustn't go across it'—and there is evidence that some of them went upon the land, they say it was this same tract of land and that they hunted and that Mr. Perry hunted after he conveyed it. These witnesses conflict. You have got positive testimony by numerous witnesses as to where the line was and you have a good deal of testimony as to possession on behalf of the plaintiff. The possession testimony amounts mainly to plaintiff's own testimony. He says he hunted on the place from time to time, over a course of years; he says that he cut some boards from fallen timber, and that he took off some posts. On the other hand, the defendant company, through certain of its agents and employees, say that they posted the land, that they plowed up and burned fire lines or fire-breaks and that they went over it from time to time to see that there was no poaching;—It is for you, and you solely, to determine whom you believe and what you believe" (R. 47-8). "We have two plats, one made and introduced in behalf of the plaintiff and one introduced and made on behalf of the defendant. One shows the property as belonging to Mr. Cone and the other shows the property as belonging to West Virginia Pulp & Paper

Company. You have heard considerable testimony as to boundaries, the canal and as to common knowledge and hearsay in the community, you have heard a number of witnesses for the plaintiff, others for the defendant, some employees of the company, some former employees, some of them with no connection, two of them named Cone testifying these were not Cone lands; other Cones testified they were Cone lands. Now, gentlemen, these facts are for you to determine and you entirely" (R. 49). Under this charge, the jury found for the plaintiff in the amount of Fifteen Thousand ($15,000.00) Dollars.

After these clear issues of fact under conflicting testimony were drawn, just prior to the Court's charge, the defendant moved for a directed verdict. The defendant's motion is quoted at R. 42, and applying Rule 50 (a) of the Rules of Civil Procedure the specific grounds of the defendant's motion were "' he proof deduced by the defendant, we feel substantiates title conclusively in this land in the defendant, not in the plaintiff, as he attempted to show." The defendant's motion did not give as grounds that the defendant had under all the evidence proved superior possession. This undoubtedly was due to the fact that the evidence on possession was so nearly equalized that the defense relied entirely on their chain of title.

The Circuit Court of Appeals in its opinion (R. 139) (153 F. (2d) 576) completely ignored the defendant's proof of paper title since the evidence was so obvious that the disputed land was not a part of the defendant's chain of title and apparently entered judgment for the defendant based on its version of the evidence that the defendant had proved superior possession.

The Seventh Amendment to the United States Constitution, and Rule 38 of the Rules of Civil Procedure, are in-

tended to preserve inviolate one of the most precious rights given by the Anglo-Saxon race to the world. The whole history of the right to trial by jury is predicated on the inherent wisdom of twelve laymen to discern the truth from testimony and evidence. One of the most compelling necessities for which the jury system was established was to decide the issues of ownership and possession of lands. The right under our Constitution of a citizen to hold his land peaceably against the privileged and powerful is one of the most sacred pillars of our civilization and way of life. The crux of this case was simply stated by the trial justice to be the fact of whose land was it, Cone land or Waring land, since the memory of man runneth not to the contrary. As to these facts, there was a substantial conflict of testimony.

In *Baltimore & Carolina Line* v. *Redman* (55 Supreme Court 890, 295 U. S. 654) this Court apparently laid down the rule that the Circuit Courts of Appeal, under Rule 50-B could reverse a verdict and judgment and enter a contrary verdict and judgment for the opposite party based on the ground that all questions of law passed upon by the trial court were reserved for analysis in the appellate court. There was under the common law at the time of the establishment of the United States Constitution a recognized custom of permitting such action, where certain procedural requirements were complied with, such as reserving questions of law set up on motions to dismiss and for a directed verdict. These cases have held that such procedural reservation of the questions of law is no longer necessary in cases where the grounds for the motion for directed verdict or notwithstanding the verdict were based on the insufficiency of the evidence to support the verdict. (See *Baltimore & Carolina Line* v. *Redman*, 296 U. S. 654 ,55 Supreme Court 890, at page 892.)

In this case, the motion for a directed verdict by the defendant was not based on the sufficiency of the evidence to establish superior possession in the defendant (as held by the appellate court) but was specifically grounded on the superior weight of the evidence that the defendant had legal title to the diputed lands (see defendant's motion R. 42), so that no reasonable man could differ as to the fact of title.

Under the loose common law procedure, the defendant could simply move for a directed verdict on the ground that the evidence was insufficient to support the verdict. However, the present Rules of Civil Procedure, which were adopted with an eye to the ruling of this Court in *Slocum* v. *New York Life Insurance Company* (228 U. S. 364, 33 Supreme Court 523), and *Baltimore & Carolina Lines* v. *Redman* (295 U. S. 654, 55 Supreme Court 890), now require that a "motion for directed verdict shall state the specific grounds therefor." (Rules of Civil Procedure, 50(a).)

> "The requirement that specific grounds for the motion for a directed verdict must be stated settles a conflict in the Federal cases." (16 U. S. Supreme Court Digest, Note to Rule 50(a), page 297.)

Therefore, the appellate court was restricted to an analysis of the defendant's proof of superior title as a matter of law. The plaintiff submits that a close examination of the opinion of the Circuit Court of Appeals in the instant case patently shows that this proposition of law was not analyzed by that Court nor was their reversal based on a conclusion that the evidence showed superior title in the defendant. If the appellate court's decision had been based on weight of the evidence of title in the defendant, their action would have been justified only to "Grant directed verdict when the evidence is such there are no controverted issues of fact upon which reasonable men could differ."

(*McIlvaine Patent Corp.* v. *Walgreen Company*, 138 F. (2d) 177, and cases therein cited on page 179.)

> "In an equity suit it is the duty of this court to direct the lower court to enter the decree which should have been entered, but in a law case this court is merely a reviewing court and cannot retry the case and direct the entry of the judgment which it thinks should have been entered." (*Millers Mutual Fire Insurance Association* v. *Warroad Potatoe G. Association*, 94 F. (2d) 741, at page 743 and citations thereunder.)

> "Rules of common law permitting judgment non obstante verdicto and arrest of judgment on verdict include only those cases in which pleadings present no material issue requiring trial or verdict." (Rose's Notes on U. S. Reports, Volume 20, page 810.)

The appellate court instead of passing upon the sole question of law as to the superior evidence of title in the defendant, ignored these grounds. "Since the defendant has also undertaken to show its own actual possession, it is in order to consider the legal status of two conflicting claims of possession at the same time. (*West Virginia Pulp & Paper Company* v. *A. N. Cone*, R. 146-7, 153 F. (2d) at page 581.) The appellate court then proceeded to re-examine the testimony and to re-weigh it and came to the erroneous conclusion, "This proof of the defendant showed the cutting of an extensive fire line by the CCC on behalf of the Paper Company, the regular maintenance and clearance of this line by Company agents, the regular posting of the property by the Paper Company, entry upon the property to guard against poachers and fire hazards at intervals of about once a week by an agent of the Company, and finally the entry (herein complained of) when the bulk of the timber on the property was cut. It is difficult to see that defendant could have done much more to assert its possession." (153 F. (2d) at page 580, R. 144.)

Had the appellate court been present at the trial, it would not have drawn the erroneous conclusion that the agents of the company went on the property once a week and regularly maintained extensive fire lines and regularly posted trespass notices. The issue of the credibility of the defendant's witness was a matter entirely for the jury to settle and not a question of law. As has been ably stated by Judge Faris in case of *Yutterman* v. *Sternberg* (86 F. (2d) 321, 324), "Truth does not always stalk boldly forth naked, but modest withal, in a printed abstract in a court of last resort. She oft hides in nooks and crannies visible only to the mind's eye of the judge who tries the case. To him appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or the flippant or sneering tone, the heat, the calmness, the yawn, the sigh, the candor or lack of it, the scant or full realization of the solemnity of an oath, the carriage and mein. The brazen face of the liar, the glibness of the schooled witness in reciting a lesson, or the itching overeagerness of the swift witness, as well as honest face of the truthful one, are alone seen by him. In short, one witness may give testimony that reads in print, here, as if falling from the lips of an angel of light, and yet not a soul who heard it, nisi, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify."

The trial justice was impressed by the defendant's witnesses and evidence of title in an entirely opposite manner from the Circuit Court of Appeals, and with reference to the defendant's proof of title. At page R. 104 the court stated, "As a matter of fact, all of the testimony as to title was vague and uncertain. The defendant itself attempted to

prove title and yet there was a hiatus of many years duration wherein this property did not appear in its name on the tax books. In the defendant's attempt to prove title its showing of the acreage it obtained did not at all coincide with that shown on the plat. The surveyor who made the compiled plat of this and other contiguous properties was not called although there was no showing that he could not be located."

"As a matter of fact, as above stated, the matter of title was not clearly proved by either plaintiff or defendant and the main point argued to the jury was that of possession.—But plaintiff did not have to prove perfect legal title. He could rely on a legal possession. The main point submitted to the jury was who was in lawful possession, and there was conflicting evidence."

The above impressions of the evidence left with the Circuit Judge and the jury as to the issues of title and possession can readily be seen to be at great variance with the impressions drawn by the Court of Appeals from the printed abstract in that court which led it to state: "It might be contended that the jury's verdict for the plaintiff has established such possession. But such is not the case where improper evidence was before the jury as to plaintiff's title, so that the general verdict may just as well have been based upon the jury's conception that the plaintiff had title as that he had possession." (R. 147.)

It is submitted by the Plaintiff that the basis of the Appellate Court's ruling was applying its own test of the credibility of the plaintiff's testimony. The court states: "The quality of the plaintiff's proof as to any such possession left much to be desired. Accepting his own testimony at face value, he had hunted on it, though not every year, had cut and sawed some fallen trees for clapboard in 1923 or 1925

'and all through there', and would camp upon it for as much as a week at a time during hunting season. However, he had never posted it, claimed never to have seen either the fire line cut by the CCC in 1935 or the posted signs regularly maintained by the defendant, both of which were testified to by several witnesses, and finally summarized his actions in the following words. 'After I moved away from there (in 1923) I didn't do nothing.' Aside from this testimony, the only other evidence of his possession was that he paid taxes on the property and that his father, in his behalf, had given one other individual permission to hunt on the property" (R. 142). The credibility of this witness was fully understood by the jury and full weight given to his testimony by the verdict, the plaintiff being an uneducated man over sixty years of age and being very ill. The record shows that the case was postponed from the January term to the May term, 1945, because of the plaintiff's serious illness, from which he almost died, "Yet there was about the witness that carried conviction of truth to every soul who heard him testify", although he may have testified "so that it reads brokenly and obscurely in print."

The appellate court was without authority either to test the credibility of the plaintiff's testimony of possession or the defendant's testimony of possession, since such is an issue of fact and "a finding of fact contrary to the weight of the evidence is an error of fact which cannot be reviewed." (*United States* v. *Washington Dehydrated Food Company*, 89 F. (2d) 606 at page 609 and cases therein cited.) Thus, even were the weight of the evidence against the plaintiff (which is denied), such would be an error of fact. And, even were the case not one at law for a jury to decide, but one in equity for the court to decide, "Errors

alleged in the findings of the court are not subject to revision by the Circuit Court of Appeals, or by this Court, if there was any evidence upon which such findings could be made." (*United States* v. *Washington Dehydrated Food Company, supra*, citing *Hathaway* v. *National Bank*, 134 U. S. 494, 498, 10 S. Ct. 608 and other cases.)

The opinion of the Circuit Court of Appeals further evidences its invasion of the function of the jury by reweighing the value of the plaintiff's evidence as to payment of taxes by him for more than twenty years and by reweighing plaintiff's evidence that the defendant did not pay taxes on the disputed property. Section 2605 of the Code of Laws of South Carolina for 1942 provides: "That all land shall be listed and assessed as the property of the person or persons having the legal title to and the right to possession of——." The Supreme Court of South Carolina in construing the effect of this statutory provision has held that the payment of taxes is, under such statute, evidence of title and of the right to possession of land.

> "When we come to the return for taxation being made in the name of James Stuart, it seems to me we have very strong circumstance to support his claim,—I find it sufficient proof of adverse possession and of a grant." *Campbell* v. *Stuart, et al.*, 84 S. E. 415, 100 S. C. 144.

The defendant's failure to pay taxes on the disputed property was also evidence that the defendant did not claim the disputed property. (*Gadsden* v. *West Shore Investment Company*, 99 S. C. 172, 82 S. E. 1052-1053.) The Court of Appeals, after reweighing this testimony, ignored the Rule of the South Carolina Supreme Court and held erroneously as follows: "It is most unfortunate that the system of keeping the land records for taxation in this region was such that it is almost entirely impossible to

determine with any measure of certainty, just what parcel or parcels of land were covered by a particular tax payment.—In such a state of the records it does not appear that material reliance by either party upon payment of taxes is really justifiable." (153 F. (2d) page 580, R. 145.) The plaintiff's record of taxation was clear and it was only the defendant's attempt to show some payment of taxes from 1936 to 1941 that was confused.

The Court of Appeals was so prone to reweigh the evidence against the plaintiff that it held in its opinion: "It may be noted that plaintiff's deed from his mother, contrary to almost universal practice, makes no mention whatsoever of the source of his grantor's title" (R. 141), and placed this as evidence on the scales against the plaintiff by inferring that the non-existence of such a recital proved the mother had no title to the disputed property. Not only does the record fail to indicate any such inference, but the universal practice in land matters in South Carolina is not to include the source of title.

Plaintiff submits that the action of the Circuit Court of Appeals was not a lawful analysis of the testimony to determine whether or not a verdict should have been directed for the defendant on the grounds that there were no controverted issues of fact upon which a reasonable man could differ as to the defendant's proof of superior title, as is authorized under Rule 50-B of the Rules of Civil Procedure, but, on the contrary, the appellate court's opinion obviously reveals its usurpation of the function of the jury, contrary to the Seventh Amendment of the Constitution of the United States, in that it vacated the judgment after testing its own credibility of the witnesses and the weight of evidence of the fact of possession, and came to the conclusion, "It is difficult to see that the defendant could have done much more to assert its possession", and reversed the judgment

and verdict of the plaintiff and entered judgment for the defendant on the ground of superior possession, which grounds were not laid by the motion for directed verdict and that such action is not authorized by Rule 50-B.

II

The action of the Circuit Court of Appeals in reversing the verdict and judgment of the plaintiff and gratuitously entering judgment for the defendant is contrary to and in violation of Rule 61 of the Rules of Civil Procedure.

> "Rule 61. Harmless Error. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

The rule undoubtedly must be read in conjunction with the Seventh Amendment of the Constitution of the United States and Rule 38 of the Rules of Civil Procedure. The purpose of this Rule and the statutes with which it conformed was designed to prevent usurpation of the power and function of the jury to determine facts and issues based on the excuse of procedure permitting determination of legal questions arising from the trial of a case. In arriving at a determination of whether or not the verdict and judgment of the plaintiff in the district court should be reversed, the appellate court was bound to make a finding that failure to set aside the verdict and judgment would have been inconsistent with substantial justice. "Substan-

tial justice" is defined in Words and Phrases, Volume 40, page 503, as follows: "Substantial Justice means a fair trial to each of the parties."

A. It, therefore, becomes necessary to analyze the evidence introduced at the trial and the procedural actions at trial to determine whether or not a fair trial was had in the Circuit Court. A close analysis of the opinion of the Court of Appeals makes no mention that failure to set aside the verdict and judgment would be inconsistent with substantial justice. The only basis upon which the Appellate Court apparently placed its right to reweigh the evidence relates to the introduction by the plaintiff of a deed from his grandfather to his father and the plat of the grandfather of 1847. The appellate court stated: "It may be interjected here that harmful error unquestionably took place in the admission of, and failure to take from the jury, testimony with respect to the plaintiff's purported chain of title prior to the deed from his mother to him." (R. 141, 153 F. (2d) page 578.)

The Virginia Code of Civil Procedure, Section 6331, of 1919, contains a mandate similarly worded to Rule 61 of the Rules of Civil Procedure. This provision including the definition of the term Substantial Justice, was construed by the Supreme Court of Appeals of Virginia as follows:

> "The revisors in Section 631 of the Code of 1919 in keeping with the modern trend of legislative and judicial policy, added a new clause to the old section and the statute now provides that—
>
> 'No judgment or decree shall be reversed . . . for any error committed on the trial were it plainly appears from the record and from the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been done.'

"It is our purpose to vitalize this provision in its application and administration. Of course, there will always be room for doubt as to whether the right result has been reached when the evidence has been in serious conflict; but in causes triable and tried by juries 'Substantial Justice' in a legal sense has been attained when litigants have had one fair trial on the merits, and although instruction No. 3 was open to the criticism which we have discussed, it could not have reasonably misled the jury, and we hold that the error does not warrant a reversal." (*Virginia Ry and Power Co.* v. *Smith and Hicks*, 105 S. E. 532, at page 535, 129 Va. 269.) It is the contention of the plaintiff in this case that the defendant had a fair trial and substantial justice was done, and no error was committed that could have reasonably misled the jury.

Section 378 of the Code of Laws of South Carolina of 1942 provides as follows:

"Whenever it shall appear that the occupant or those under whom he claims, entered into the possession of premises under claim of title, exclusive of any other right, founding such claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree of judgment of a competent court, and that there has been a continued occupation and possession of the premises included in such instrument, decree or judgment, or of some part of such premises under such claim for ten years, the premises so included shall be deemed to have been held adversely;—"

Section 379, immediately following the above provision, states:

"For the purpose of constituting an adverse possession, by any person claiming a title founded upon a written instrument or a judgment or decree, the land shall be deemed to have been possessed and occupied in the following cases: (3) Where although not enclosed it has been used for the supply of fuel or of

fencing timber, for the purposes of husbandry or the ordinary use of the occupant."

The plaintiff, relying on the above statutes and the decisions of the Supreme Court of South Carolina, and in particular *Macedonia Baptist Church* v. *City of Columbia* (10 S. E. (2d) 350, 195 S. C. 59) introduced in evidence his deed from his mother which had been on record for more than twenty years, to-wit: from August 16, 1920, to September, 1941, when the trespass was committed, and to June 22, 1945, when the case was tried. He testified he entered into possession of the tract under this deed and he had paid taxes on the property since 1921; that he hunted on the property, got wood on it, clapboards, covering for barns and houses and two and three foot boards (R. 3-4). He then was asked if he had a deed from his father to his mother for the disputed tract of land, to which he replied he did not have such a deed (R. 5). He was then asked if his mother was in possession. He was then asked if his father was in possession of the property prior to 1917, and replied that he had been in possession from about 1888 (R. 5). He then introduced deed from A. Miles Cone to Miles Cone dated December 19, 1888, and plat by T. P. Cooper, Surveyor, dated January 15, 1847, showing the lands of the grandfather, A. Miles Cone. Although this deed and plat of the grandfather to the father were objected to by the defendant, it notified the plaintiff prior to trial that it would introduce these identical deed and plat and later in the trial, waived its objection to the deed and this plat and actually introduced the identical deed and plat as part of the defendant's exhibits, the deed being shown as defendant's exhibit No. D-13 (R. 68), and the plat with the same exhibit number (R. 71). The defendant thus could not be heard to complain that it did not have a fair trial because of the introduction of this deed and plat by the plaintiff when it in turn introduced this identical evidence.

Nor can the defendant claim the introduction of this deed and plat by the defense was motivated or compelled by the erroneous introduction by the plaintiff, since in accordance with pre-trial agreement, on May 18, 1945, the defendant served notice on the plaintiff's counsel that this very deed and plat would be introduced as part of the defendant's case. (See letter of Waring and Brockinton, attorneys for the defendant, shown on page R. 136, Item No. 1 in said letter.)

Under the *Macedonia* decision of the Supreme Court of South Carolina *(supra)* and section 378 and 379 of the South Carolina Code, the plaintiff was not required to introduce the deed from the grandfather to the father and the plat of the grandfather in his case in chief.

> "The important question is thus raised whether a plaintiff alleging both title and possession is entitled to recover damages upon proof of his possession and the invasion of it by the defendant, *without proving also that he has a perfect title.* The question must be answered in the affirmative. One person who finds another in possession of land cannot, by seizing the possession or invading it, put him whose possession he seized or invaded to proof of his title. In such a case possession is prima facie evidence of title and he who invades it must establish his title. If this were not so, a holder of land could be put to proof of title against the world by anyone who might choose to trespass or squat upon his lands. This conclusion is well supported by authority. When the plaintiff alleges an invasion of his possession this gives character to the action, as one in the nature of the old action of trespass quare clausum fregit. Couch *v.* Burke, 2 Hill Law 534; Connor *v.* Johnson, 59 S. C. 145, 37 S. E. 240." *Beaufort Land & Investment Company v. New River Lumber Company*, 68 S. E. 637, page 638, 86 S. C. 358.

> "This was error because this was an action of trespass *quare clausum fregit* in which form of action it was not legally encumbent upon the plaintiff to recover on

the strength of its title, but it was sufficient to make out plaintiff's case by merely showing possession on the part of the plaintiff." *Santee River Cypress Lumber Co.* v. *Elliot, et al.*, 150 S. E. 683, page 691, 153 S. C. 179.

"This is not an action to try title. It is one to recover damages for trespass to property of which the plaintiff was in possession. The deed which plaintiff produced was sufficient to show that the Church was in lawful possession of the property." *Macedonia Baptist Church* v. *City of Columbia*, 10 S. E. (2d) 350, 195 S. C. 59.

The introduction of this evidence was necessitated in anticipation of the defendant's introduction of such evidence and to explain that this deed and plat did include the land under dispute and, therefore, that the disputed land was a part of the tracts there shown and not a part of the Waring Plantation adjoining it, under which the defendant was going to claim. The oral testimony of the plaintiff and his brother, Owen Cone, that his mother, father and grandfather were in possession of the land as a part of the deeds and plats proposed to be introduced by the defendant, and the oral testimony of John D. Harrison (R. 105-6); Robert Williams (R. 108-9); Frank Green (R. 109-10); and Julia Anne Driggers (R. 110), were admissible to identify the disputed property as known in the community as Cone land, and not a part of Waring Plantation, under which the defendant claimed, and was not withheld until reply because the plaintiff was on notice that the defendant would introduce the deed and plat of the father and the grandfather.

It, therefore, is patently clear that since the introduction of the deed from the grandfather to the father and the plat of the grandfather was injected into the case by the defendant, it can not be said that the introduction of this evidence deprived the defendant of a fair trial, and, therefore, the failure by the District Court to direct a verdict on the

grounds of superior title in the defendant, was not a denial of or inconsistent with substantial justice, and the appellate court was without power to vacate the verdict and judgment. No motion *non obstante verdicto* was made.

The plaintiff introduced certificates from the records of Dorchester County that he had paid taxes on the disputed lands for more than twenty years and that his mother and father had paid taxes on the land thereon, and the payment of taxes for more than twenty years, coupled with the plaintiff's possession, presented fair issues of fact to go to the jury under a fair trial and refusal to direct verdict even on such grounds and take the case from the jury would not have been inconsistent with substantial justice.

> "The possession of the Bardins was adverse and continuous for more than 20 years; and while the land in question was not cultivated or inclosed, it was used for the supply of fuel and timber, the ordinary uses for which such land was fitted. Code Civ. Proc. 1902, paragraph 103."

> "The payment of taxes on the land for a number of years by the Bardins was also some evidence to be submitted to the jury on the ground whether the state had parted with title." *Bardin et al.* v. *Commercial Ins. & Trust Co.*, 64 S. E. 765, 82 S. C. 358.

B. Even if the rule of the Supreme Court of South Carolina was that the plaintiff had to prove perfect paper title, the action of the Circuit Court of Appeals in reversing verdict and judgment for the plaintiff, and entering judgment for the defendant, is in violation of Rule 61 because the Circuit Court of Appeals would only have been justified in sending the case back for a new trial by its own express opinion. The appellate court's opinion alleges that: "Specifically, we have already indicated our opinion that prejudicial error occurred in the admission of evidence with reference to the plaintiff's alleged predecessor in title. This

ground alone is sufficient to require a remand of the case for a new trial." (R. 146). It necessarily follows that if the introduction of the deed from the father to the grandfather and the plat of the grandfather were prejudicial (which is not true as shown above) so that the defendant was denied a fair trial, the Court of Appeals was limited to send the case back for a new trial by its own opinion.

In determining whether or not the defendant was denied a fair trial, it must be kept in mind that the plaintiff, in accordance with the rules of the Supreme Court of South Carolina, having introduced a deed and testimony of paper title and possession for more than twenty years, the burden of proving superior title as a defense was then cast upon the defendant.

> "Judge O'Neall, in a concurring opinion, said: 'When the plaintiff's possession, actual or constructive, is entered upon, I think such possession is evidence of title to put the defendant to prove his title.' In Connor *v.* Johnson, supra, the court held that the action was in the nature of trepass quare clausum fregit; that is, an action for the invasion of the possession of the plaintiff, where the complaint alleged the plaintiff to be in possession *under a paper title*, and that the defendant had trepassed, and the answer denied all the allegations, including, of course, the allegations of plaintiff's possession and his paper title, and set up title in defendant. In such an action it was held that it was only necessary for the plaintiff to show possession, and that for defendant to prevent a recovery, it was not sufficient to show that the plaintiff had no title, but that he must show title in himself." *Beaufort Land & Investment Company* v. *New River Lumber Company*, 68 S. E. 637, page 638, 86 S. C. 358.

The defendant did not carry this burden of evidence, but on the contrary, the evidence is uncontested that the disputed property was not a part of the lands purchased

by the defendant and was never claimed or occupied by the defendant's grantor.

The appellate court apparently, in determing whether or not the defendant had a fair trail, ignored this rule of the shift of the burden of evidence and after testing the credibility of the plaintiff's testimony and reweighing the evidence, came to the conclusion that the alleged erroneous introduction of the deed from the grandfather to the father and the plat of the father in the record should be stricken out and that the state of the record after striking out such alleged erroneous evidence deprived the plaintiff of a prima facie case. Although it has been previously shown that this view of a fair trial is erroneous, even if it were so, the action of the appellate court in entering judgment for the defendant deprives the plaintiff of his constitutional right to a new trial and the opportunity to present additional evidence to cure the alleged defect. It is the position of the plaintiff that even were the appellate court's interpretation of South Carolina Law correct, the plaintiff is entitled to a new trial wtihout the alleged erroneous evidence in the record.

The fafacy of the reasoning of the appellate court is apparent in that if the issue of fact presented to the jury was whether or not the disputed land was Cone land or a part of the Waring Plantation of the defendant, they have determined by their verdict that the land was a part of the Cone holdings, and not a part of the Waring Plantation. The only complaint then, of the plaintiff's *perfect* chain of title, would be a missing link between his father and his mother. It is patent that such a defect did not deny the defendant of a fair trail and such defect is a matter of form and not of substance. If the disputed land was a part of the Cone holdings, the plaintiff's witness, Owen Cone, testified in open court and it will be admitted by the defendant, is the present holder of the estate lands and

all the interest of Miles Cone, the father, and would be the present holder of the title of the disputed lands as a part of the father's and grandfather's. Such a defect of form can readily be cured by a quit claim deed from Owen Cone to his brother, the plaintiff. But the plaintiff submits that the said Owen Cone, having appeared in open court under oath, declaiming any interest in the disputed lands and acknowledging the ownership and title thereof to be in the plaintiff, it would be repugnant to substantial justice to send the case back for a new trial for the execution of a mere formal quit claim.

The plaintiff further submits that it would be inconsistent with substantial justice to send the case back for a new trial without correcting the erroneous law of the case as laid down by the Court of Appeals.

Conclusion

WHEREFORE, it is respectfully submitted that the above analysis of the facts of trial and evidence in the case and the applicable law can lead but to the conclusion:

1. That the Circuit Court of Appeals was in error in vacating the verdict and judgment of the plaintiff and entering judgment for the defendant since that court was restricted to an analysis of the weight of the evidence as to the proof of the defendant's title under Rule 50-B and was without authority to reweigh the evidence, test the credibility of the witnesses of its own volition as to the weight of the evidence of possession between the plaintiff and the defendant; and

2. The Circuit Court of Appeals was in error in vacating the verdict and judgment of the plaintiff and in entering judgment for the defendant contrary to the mandates of Rule 38 and Rule 61 and the Seventh Amendment of the

Constitution, since the defendant had a fair trial in the Circuit Court and the issue of title and possession were decided as questions of fact by the jury; and

3. If the above two propositions are not true, the Circuit Court of Appeals was in error in entering judgment for the defendant and in failing to remand the case for a new trial since only a procedural error in the introduction of evidence was complained of or found by the appellate court which would require a new trial.

The plaintiff submits that the verdict and judgment of the United States District Court for the Eastern District of South Carolina, Charleston Division, dated and filed April 1, 1946, pursuant to a mandate of the United States Circuit Court of Appeals, Fourth Circuit, dated and filed March 15, 1946, should be reversed and the verdict and judgment of the plaintiff, together with costs, be restored; or that said verdict and judgment for the defendant should be reversed and mandate issued by this Honorable Court for a new trial and that the costs of appeal be taxed against the defendant.

Respectfully submitted,

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